(2)

No. 01-1709

IN THE

Supreme Court of the United States

AFC COAL PROPERTIES, INC.,
Petitioner,

v.

DELTA MINE HOLDING COMPANY
and MEADOWLARK, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

W. STANLEY WALCH
CHRISTOPHER M. HOHN
THOMPSON COBURN LLP
One US Bank Plaza
Suite 3500
St. Louis, Missouri 63101
(314) 552-6000

RICHARD MCMILLAN, JR.*
CLIFTON S. ELGARTEN
STEVEN P. TAUB
EDWARD R. MURRAY
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

*Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24pg

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Delta Mine Holding Company states that RAG Midwest Holding Company, RAG American Coal Company, RAG American Coal Holding, Inc., and RAG Coal International Aktiengesellschaft * are corporate parents of Delta Mine Holding Company. There are no publicly held companies that own more than 10% of Delta Mine Holding Company's stock. Respondent Meadowlark, Inc. states that Coal Ventures Holding Company, Inc., Horizon Natural Resources Company, and Horizon NR LLC are corporate parents of Meadowlark, Inc. There are no publicly held companies owning 10% or more of Meadowlark, Inc.'s stock.

* RAG International Aktiengesellschaft has further parent corporations in Germany which are entirely privately held.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT	1
A. The Arbitration Provisions Of The Leases	2
B. Arbitration Proceedings	3
C. District Court Proceedings	6
D. The Eighth Circuit Decision	8
ARGUMENT	9
I. THIS CASE IS NOT IN CONFLICT WITH COMMONWEALTH COATINGS	9
II. PETITIONER FAILED TO SHOW PREJUDICE	16
III. THE EIGHTH CIRCUIT DID NOT ERR IN RAISING THE ISSUE OF WAIVER	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
Ad-Med, Inc. v. Iteld, 728 So.2d 556 (La. App. 1999)	12
Anderson v. Nichols, 359 S.E.2d 117 (W. Va. 1987)	11
ANR Coal Co. v. Cogentrix of N. C., Inc., 173 F.3d 493 (4th Cir. 1999), *cert denied*, 528 U.S. 877 (1999)	8
Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85 (N.Y. 1962)	17
Cia de Navegacion Omsil, S.A. v. Hugo New Corp., 359 F. Supp. 898 (S.D.N.Y. 1973)	11
Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968)	*passim*
Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815 (8th Cir. 2001)	*passim*
Hormel v. Helvering, 312 U.S. 552 (1941)	18
Meehan v. Nassau Cmty. Coll., 676 N.Y.S.2d 178 (N.Y. App. 1998)	11
Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), *cert denied*, 464 U.S. 1009 (1983)	8, 12
Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885 (D. Conn. 1991)	14, 17
Petrol Corp. v. Groupement D'Achat Des Carburants, 84 F. Supp. 446 (S.D.N.Y. 1949)	11
Sheet Metal Workers Int'l Assoc. Local 420 v. Kinney Air Conditioning Co., 756 F.2d 742 (9th Cir. 1985)	12
Singleton v. Wulff, 428 U.S. 106 (1976)	18
Standard Tankers (Bahamas) Co., Ltd. v. Motor Tank Vessel AKTI, 438 F. Supp. 153 (E.D.N.C. 1977)	14

TABLE OF AUTHORITIES-Continued

	Page
Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249 (S.D.N.Y. 1962)	11, 17
Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc., 10 F.3d 753 (11th Cir. 1993), *cert denied*, 513 U.S. 869 (1994)	11, 16
United States v. Continental Can Co., 378 U.S. 441 (1964)	18
United States v. Miller, 152 F.3d 813 (8th Cir. 1998)	18
Yorkaire, Inc. v. Sheet Metal Workers Int'l Ass'n Local 19, 758 F. Supp. 248 (E.D. Pa. 1990), *aff'd*, 931 F.2d 53 (3d Cir. 1991)	12
STATUTE	
9 U.S.C. § 10(a)(2) (2000)	11

IN THE

Supreme Court of the United States

No. 01-1709

AFC COAL PROPERTIES, INC.,
Petitioner,

v.

DELTA MINE HOLDING COMPANY
and MEADOWLARK, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion reported at *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2001).

COUNTERSTATEMENT

This case involves two arbitration awards issued in connection with the termination and suspension of royalty payments under two coal mining leases. The arbitration provisions of each lease contemplated a tripartite arbitration panel composed of two partisan arbitrators, one appointed by each side, and a neutral, appointed by the two partisans. Each arbitrator was required to be a "professional mining engineer or firm of professional mining engineers." Each of the *partisan* arbitrators was permitted to be an officer, employee,

shareholder, attorney, auditor of, or be otherwise interested in, the company that appointed him or her. Consistent with this structure, both panels decided that each of the two partisan arbitrators would take an active role representing his respective party at the hearings (*e.g.* by examining witnesses, etc.). The neutral arbitrator on each panel—the umpire—would then be the deciding vote on each panel.

Although the role of the party-arbitrator was determined by the parties, as reflected in the parties' arbitration agreement and in the rulings of the arbitration panel itself, the district court effectively substituted its own view of the appropriate role of a party-arbitrator and vacated the award. The United States Court of Appeals for the Eighth Circuit reversed, finding that neither the contract which contemplated arbitration by a panel composed of two partisans and a neutral, nor the procedures for the arbitration developed and applied by the panels, were unfair or impermissible under federal law. The court held that the awards were not tainted with "evident partiality" and should be confirmed under the Federal Arbitration Act.

A. The Arbitration Provisions Of The Leases

The underlying arbitration disputes concern two mining leases for property in southern Illinois. Meadowlark Farms, Inc. (now Meadowlark, Inc.) was the lessee. Delta Mine Holding Company ("Delta Mine") was subsequently incorporated to hold Meadowlark's assets and liabilities associated with the leases. Penn Central Corporation (now known as AFC Coal Properties, Inc.) was the lessor. Each lease permits cessation of royalty payments upon a determination that the premises no longer contain "Economically Recoverable Coal." The leases provide that disputes over such determinations are subject to arbitration.

Section 8.2 of each lease provides for an arbitration panel of "three arbitrators, one selected by Lessor, one by Lessee,

and a third selected by two other arbitrators . . . ." The leases specify that only the *neutral* shall not be an "officer, employee or shareholder of, attorney or auditor to, . . . either of the Parties . . . ." Reflecting the highly technical nature of the issues, each arbitrator was to be "a professional mining engineer, or firm of professional mining engineers." The leases provide that the arbitrations shall be conducted subject to the commercial arbitration rules of the American Arbitration Association ("AAA"). Pet. App. 65a-66a.

B. Arbitration Proceedings

Delta Mine designated the mining firm of Stagg Engineering Services, with which it had a long-standing consulting relationship, as its party-appointed arbitrator for both panels. AFC designated Paul Jones, who had served as AFC's arbitrator in a previous case between the parties (R. 0327-28),[1] as its arbitrator for both panels. Each party-arbitrator described himself as "representing" the appointing party on the panel. The party-arbitrators then selected a neutral—what AFC called the "umpire" (R. 0310)—for each panel.

The panels voted to conduct joint organizational meetings and, in part, joint evidentiary hearings. Each panel deliberated separately.

Pursuant to the leases, the conduct of the arbitration was to be governed by the commercial arbitration rules of the American Arbitration Association. Pet. App. 66a. Those rules, consistent with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), require a *neutral* arbitrator to specifically disclose a range of matters that might affect his or her neutrality. Consistent with the fact that neither party has a right to veto the opposing side's party-arbitrator (except for failure to

[1] Following the format used by Petitioners, citations to "R." refer to the record on appeal in the Eighth Circuit.

comply with qualifications set forth in the parties' agreement), the rules impose no disclosure obligations on the partisans.[2] As the Eighth Circuit noted in the proceedings below, those Rules provide that, "absent an agreement to the contrary, party-appointed arbitrators are presumed to be non-neutral." 280 F.3d at 822 n.4.

The parties then reaffirmed that the AAA commercial arbitration rules governed. R. 0324. Moreover, the parties each confirmed that those rules afford the arbitrators themselves broad latitude to fashion procedures that would govern the conduct of the arbitration. *Id.* at 0324, 0327.

On the subject of disclosures by party-arbitrators, Delta Mine stated its belief that no such disclosures were required under the Rules, but it was ultimately left to the party-arbitrators to voluntarily make such disclosures that they felt appropriate. Delta Mine's arbitrator disclosed a longstanding client-consulting relationship with Delta Mine and its predecessors extending over a 15-year period. AFC's arbitrator, Jones, disclosed his prior service to AFC as an arbitrator.

The panels then considered the procedures that would apply. AFC pressed for a proceeding where the parties' lawyers would argue before the panels; Delta Mine favored an approach where the partial panel members would take the lead. The panel adopted the latter lawyer-limited approach, in which "the two partial panel members [Stagg and Jones] should be in a position to ask the pertinent questions of the witnesses, rather than having it turn into a more formal judicial [proceeding] with cross examinations and so forth."

---

[2] The Commercial Arbitration Rules that govern the arbitration do *not* incorporate the document known as the "Code of Ethics for Arbitrators in Commercial Arbitrations." Indeed, the Code states that "it does *not* form a part of the arbitration rules of the American Arbitration Association."

280 F.3d at 818. Thus, the arbitration panels assigned the two partial panel members an instrumental role in the preparation and presentation of their party's case.[3]

Delta Mine's arbitrator had several meetings with counsel and other representatives of Delta Mine to prepare for the upcoming hearings. The existence of these communications was disclosed during discovery in the arbitration, and AFC's counsel objected to the arbitration panels, claiming that a party-appointed arbitrator should not play so active a role in preparing the case. The panels, including AFC's arbitrator, "[t]horoughly discussed" the roles of the party-appointed arbitrators and rejected AFC's objections, finding them contrary to the panels' prior instructions. R. 0431.

AFC's party-arbitrator then communicated the panels' decision to AFC (both parties openly communicated *ex parte* with their arbitrator). He reported to AFC that the neutrals were not "taken back" by the party-arbitrators' participation in preparation sessions. 280 F.3d at 819. To the contrary, AFC's party-arbitrator reported that the neutrals "expect the Party Arbitrator to be adequately briefed to know where the testimony is going and to be able to ask questions for clarification, etc." *Id.* In fact, the neutrals expressed surprise that AFC and its partisan arbitrator were not doing the same. R. at 0798.

Following the hearings, during deliberations, the neutrals continued to use the partial panel members as a direct link to the party each represented.[4] Thus, with the full knowledge of

---

[3] Indeed, when AFC asserts in its petition that Stagg and his firm had a sinister, undisclosed interest based on its receipt of money from Delta Mine (Pet. 2, 5), AFC neglects to mention that Stagg Engineering Services was largely paid for its efforts in preparing and presenting the case as specifically directed by the panels (compensation was not tied to any particular outcome).

[4] This did *not* extend to allowing the parties to submit additional *evidence* after the deliberations began.

the opposing partisan, the partisan panel members were allowed to go back to their parties to help identify evidence in the record or clarify their respective parties' position.

The neutrals prepared the final decisions. The final decisions were concurred in by each partisan to the extent that the decision affirmed its party's position.

C. District Court Proceedings

Following limited discovery, and based on a paper record, the district court vacated the awards. Citing no case law, and clearly uncomfortable with the notion of an "arbitrator-advocate," the district court declared that "the conduct of Delta Mine's arbitrator" went far beyond "the proper role of a party-appointed arbitrator." Pet. App. 18a. The district court looked to the AAA Code of Ethics as a source of governing rules, notwithstanding the district court's acknowledgement that the parties had never agreed to incorporate those code provisions into the arbitration.[5] Most importantly, the court declined at any point to acknowledge the substance or implications of the arbitration panels' own rulings about the active role to be played by the party-arbitrators in the conduct of the proceedings. The panels themselves had *decided* the proper role of the party-arbitrators.[6]

---

[5] The district court got it backwards by suggesting that the "Code" became a governing standard because the parties "did not agree to waive the provisions of the Code." Pet. App. 39a. To the contrary, the parties never agreed to adopt the Code as providing controlling rules for the arbitration. In fact, the district court found that "there was apparently no meeting of the minds about . . . whether the Code of Ethics for Commercial Arbitrators ("Code") would apply to the arbitrations." Pet. App. 37a.

[6] For example, the district judge disparagingly termed Delta Mine's arbitrator the "inside-mouthpiece" for Delta Mine, without acknowledging that this was precisely the role that the arbitration panel itself had assigned to the party-arbitrators.

Finally, the district court's decision was pervaded with clear factual error. Much of the district court's criticism of Delta Mine's party-arbitrator was ultimately rooted in the district court's "finding" that he had secretly communicated with Delta Mine during deliberations—a point no longer even pressed in the Petition to the Court. The district court reached its conclusions on this point *sua sponte*, notwithstanding that (as the court acknowledged) AFC had presented no issue on the point and Delta Mine had never had the opportunity to respond with evidence or argument. The district court's conclusions on this point—and the resulting criticisms of the integrity of both Delta Mine's arbitrator and Delta Mine's counsel—were wholly unjustified and unsupported. Not only was the behavior of Delta Mine's party-arbitrator consistent with the procedures established by the panels, but the neutral arbitrators were also fully aware of these contacts.[7] In fact, as further evidence that all of the parties and arbitrators recognized such communications to be proper, the Eighth Circuit noted that there was "credible evidence" that AFC's party-arbitrator knew of these communications and was communicating likewise with AFC. 280 F.3d at 823.

Given the district court's erroneous "finding" that Delta Mine's arbitrator had engaged in such surreptitious communications, it is not surprising that the trial court's opinion is littered with attacks on his character and integrity (these attacks also form the basis for the various assertions about "concealment," "deceit," and "chicanery" leveled throughout the Petition to this Court). But that root "finding" is simply baseless. As the Eighth Circuit properly noted, the neutrals

---

[7] The record clearly establishes that the neutral arbitrators were aware of the communications between the parties and their arbitrators. At one point, a neutral panel member directed Delta Mine's arbitrator to seek clarification from Delta Mine and its parent company (R. 0461) and, on at least one occasion, Delta Mine's arbitrator reported to the neutral that he had been in contact with Delta Mine and its counsel (R. 0502-03).

were not misled or deceived and the parties behaved "precisely as one would expect from the terms of the agreements to arbitrate." *Id.* at 822.

D. The Eighth Circuit Decision

In a unanimous decision, the United States Court of Appeals for the Eighth Circuit reversed. The court found the District Court's decision insupportable for three separate and independent reasons: (1) that there was no showing of any violation of the Federal Arbitration Act's substantive provisions allowing for vacation of an award; (2) there had been no showing of prejudice arising from anything about which AFC had complained; and (3) AFC had never objected to the continued participation of Delta Mine's arbitrator in the proceeding. The Eighth Circuit noted at the outset that the court's power to overturn an arbitral award is limited to the grounds set forth in the Federal Arbitration Act. Because the Preamble to the AAA Code of Ethics provides that it is not part of the AAA Rules and does not form a ground for judicial review of an award (R. at 0293-94), the Eighth Circuit rejected the notion that the Code of Ethics sets forth binding rules to govern the arbitration when it has not been adopted by the parties.[8] Rather, the Eighth Circuit upheld the right of the parties to contract for an agreed form of arbitration that permitted a panel comprised of one neutral and two partisans.

The court noted numerous cases upholding an arbitration panel composed of a neutral panel member and two partisan arbitrators, and held there was nothing "insidious" about the

---

[8] In so holding, the court was ruling consistently with the decisions of other courts. *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 497 n.2 (4th Cir. 1999) (refusing to apply the code where the parties agreed only to arbitrate according to the AAA rules), *cert. denied*, 528 U.S. 877 (1999); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983.

procedures the panels employed. An arbitration panel is free to customize the procedures to govern the arbitration as it sees fit. Further, the neutrals were not deceived, which means there could be no prejudice. The court also held that, while AFC objected to the arbitration panels about certain procedural particulars, it never sought the removal of Delta Mine's arbitrator for partiality.

The Eighth Circuit directed confirmation of the awards in their entirety, both as to the main portion of the awards and on the "Williamson offset issue" where the award had been in AFC's favor. 280 F.3d 824.

ARGUMENT

Petitioner presents no issue warranting a writ of certiorari. Petitioner suggests no conflict among the Circuit Courts. There is no inconsistency between the decision below and any decision of this Court. The case decides no matter of national importance, but rather addresses the specifics of the particular contractual arbitration clauses agreed to by the parties. Moreover, both in describing the applicable principles and applying them to the situation at hand, the decision of the Eighth Circuit is clearly correct. Petitioner does not offer a plausible basis for certiorari on any of the three grounds for decision below, let alone on all of them.

I. THIS CASE IS NOT IN CONFLICT WITH COMMONWEALTH COATINGS

AFC's assertion that its petition warrants a writ of certiorari rests primarily on AFC's mistaken insistence that the decision of the court below is inconsistent with this Court's decision in *Commonwealth Coatings*, 393 U.S. 145, particularly as it concerns the existence of an obligation to fully disclose potential conflicts of interest. Petitioner is wrong for at least three reasons. First, *Commonwealth Coatings* addresses the disclosure obligations of a neutral

arbitrator, not concededly partial arbitrators on a tripartite panel, who (under the Rules applicable to this arbitration) had no disclosure obligations. Second, while the proper rule under the procedures adopted by the parties in this case is that a non-neutral, party-appointed arbitrator has no obligatory duty of disclosure, the Eighth Circuit found in this case that the partial arbitrator had, in fact, voluntarily made a sufficient disclosure of his partiality. Third, the "interest" that Petitioner complains of—that the arbitrator was involved in the preparation of the case—was specifically approved by the arbitral panel as appropriate to these proceedings.

1. *Commonwealth Coatings* does *not* speak to the issue presented by Petitioner here. *Commonwealth Coatings* addressed the disclosure obligations of a putative *neutral* arbitrator. The obligation to disclose sources of potential conflict of interest serve a vital interest as respects an arbitrator who is required to be *impartial*. The requirement that the putative neutral disclose facts bearing on his or her neutrality provides a means to assure the impartiality of a neutral, which, in turn, is the foundation on which the integrity of the process depends. Specifically, it allows both parties to knowledgeably exercise their right to reject, or object to, the neutral arbitrator for cause, *i.e.*, as not, in fact, neutral.

In arbitrations of the type at issue here, which are commonplace in the United States (Pet. 18), the party-arbitrators perform functions fundamentally different from the neutral. Each party chooses his own "party-arbitrator." There is no requirement that he or she be unbiased *unless* the arbitration agreement specifically so provides. The AAA Rules, incorporated into the parties' agreement here, specifically provide that the party-appointed arbitrators are presumed to be *non-neutrals* and are not subject to the disclosure rules applicable to neutrals. R. 0283 at § 12. In a setting where partiality is

presumed, neither side possesses a right to veto the other side's choice, or a right to object to the partiality of the opposing side's party-appointed arbitrator.

Thus, it does *not* violate the "evident partiality" standard of the Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2000), for the non-neutral arbitrators on a tripartite panel to be predisposed to their appointing party, to communicate with the appointing party, be involved in witness preparation, and advocate their party's position. Such involvement is "not only unobjectionable, but common place." *Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.*, 10 F.3d 753, 759 (11th Cir. 1993) (party-arbitrator did not engage in misconduct by meeting with witnesses, "suggest[ing] lines or areas of testimony," and assisting in the preparation for hearing), *cert. denied*, 513 U.S. 869 (1994); *Cia de Navegacion Omsil, S.A. v. Hugo New Corp.*, 359 F. Supp. 898, 899 (S.D.N.Y. 1973) ("As everyone knows, the party's named arbitrator . . . is an amalgam of judge and advocate . . . [h]e is, or may be, a somewhat interested participant . . ."); *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249 (S.D.N.Y. 1962) (no misconduct in conferring with appointing party and reviewing documentary evidence before the hearing); *Petrol Corp. v. Groupement D'Achat Des Carburants*, 84 F. Supp. 446, 447 (S.D.N.Y. 1949) ("no reason appears why the parties could not mutually agree to let one arbitrator decide the issue, thus treating him as an umpire and the other arbitrators as advocates and agents of the parties designating them").

Many state courts have similarly recognized that party-arbitrators are not neutrals. *See Meehan v. Nassau Cmty. Coll.*, 676 N.Y.S.2d 178, 181 (N.Y. App. Div. 1998) ("'partiality' of a party-designated member of an arbitral board may not be the basis for vacatur"); *Anderson v. Nichols*, 359 S.E.2d 117, 123 (W. Va. 1987) (coal-industry royalty arbitration: "where each party selects one arbitrator and the two

so selected choose a third, the parties expect their personally-named arbitrators to be the advocates for each respective position").

Thus, when an arbitration panel includes arbitrators selected by the parties, the "element of partiality" is presumed as to the party-appointed members and there is no basis to overturn the award unless the panel as a whole is biased. *Yorkaire, Inc. v. Sheet Metal Workers Int'l Ass'n Local 19*, 758 F. Supp. 248, 257 (E.D. Pa. 1990) (failure to demonstrate "the arbitration *panel* was biased"), *aff'd*, 931 F.2d 53 (3d Cir. 1991). "The parties to an arbitration . . . can ask for no more impartiality than inheres in the method they have chosen." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983). As one court recently summed up the premise of most tripartite arbitrations:

> An arbitrator selected by one of the contesting parties is effectively an advocate of such party. The third party mutually selected by them is expected to be the impartial and final judge.

Ad-Med, Inc. v. Iteld, 728 So.2d 556, 559 (La. Ct. App. 1999).[9]

A putative neutral arbitrator's affirmative duty to disclose sources of potential conflicts of interest serves a vital function—revealing potential sources of partiality—that is simply not relevant with respect to a party-arbitrator, for whom partiality is assumed. *See Sheet Metal Workers Int'l Assoc. Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) (disclosure requirements of *Commonwealth Coatings* are "inapposite" where parties are aware of arbitrator's partiality based on the method of arbitration chosen by the parties). Moreover, disclosure serves no

---

[9] Petitioner's repeated references (Pet 4, 7) to Delta Mine's arbitrator providing the "deciding vote" is misleading. It is the umpire that provided the deciding vote in each instance.

function because there is no right to demand removal of the opposing party's party-arbitrator. Petitioner's current assertion that neutrals and non-neutrals are both required to make the same sorts of disclosure of interest ignores the fact that there is no purpose in requiring disclosure by party-arbitrators.

The AAA Rules, which the parties made part of their arbitration agreement, and which governed these arbitrations, imposes extensive disclosure obligations on any arbitrator serving as neutral, but none on party-appointed arbitrators. R. 0283-84, §§ 12, 19. The parties are free, of course, to *agree* upon some different role for, or obligations upon, the party arbitrator.[10] But the parties did not do so here.

Moreover, a legislative body would be free to impose different requirements. However, contrary to Petitioner's assertions (Pet. 17-18), there is no "trend" to hold party-appointed and neutral arbitrators to "the same standards of independence and partiality." Pet. at 17.[11] But, absent some

---

[10] They would be free, for example, to incorporate the AAA Code of Ethics, which requires specific disclosures by the neutral and certain general disclosures by a party-arbitrator (R. 0301) into the arbitration agreement. Delta Mine's arbitrator, upon being asked to do so, made a general disclosure fully compliant with the hortatory provisions of the Code. *Id.* at 0330. Although Petitioner suggests to the contrary (Pet. 6), the parties did not agree to abide by the Code in this case. R. 0326-28. Thus, the Eighth Circuit properly held that the Code did not provide controlling standards for judging the conduct of the parties here. 280 F.3d at 820.

[11] Petitioner mischaracterizes the recent revisions to the Uniform Arbitration Act ("UAA"). Pet. 17-18. The revisions to the UAA actually eliminate evident partiality by a party-appointed arbitrator as a ground for vacatur. A reading of the entire text of section 12 (Petitioner includes only the text of subsections 12(a) and 12(b) in the petition) directs that the consequences for failure to disclose according to section 12 are addressed in section 23(a)(2), "Vacating Award." Comment 4 to section 12 notes that "[a] party-appointed, non-neutral arbitrator's failure to disclose would be covered under the corruption and misconduct provisions of Section

specific agreement to a different rule in a particular case, the federal courts are not free to impose such requirements on a party-appointed arbitrator under the guise of Federal Arbitration Act review of an arbitration award.[12]

Drawing upon language from the district court's opinion, Petitioner's arguments ultimately rest on the erroneous assertion that this case involves some form of "deceitful" or "sharp" practice (Pet. 3), "chicanery" (*id.* at 19), or lack of "integrity" (*id.*). As explained above (*supra*, at 7), and as the Eighth Circuit concluded, there is simply *no* basis in the record to assert that either the neutrals or AFC was misled or deceived. 280 F.3d at 822. The Eighth Circuit properly applied the standards of the Federal Arbitration Act to the facts presented by this case.

2. Although Petitioner seeks to raise a challenge concerning the extension of *Commonwealth Coating's* disclosure rule to partial arbitrators, no such issue is actually presented by the Petition. Petitioners' attempt to present this issue to

---

23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be partial." More importantly, section 23(a)(2) specifically *excludes* evident partiality by a party-appointed arbitrator as a grounds for vacatur. Comment 1 to section 23 explains that "[t]he reason 'evident partiality' is a grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them."

[12] In support of a contrary suggestion, Petitioner can cite only two district court decisions. The first, *Standard Tankers (Bahamas) Co. v. Motor Tank Vessel AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977), is a 23-year old opinion from the Eastern District of North Carolina that improperly appears to reject the very concept of an arbitration panel composed of two partisans and a neutral. *Id* at 159. Further, there is no suggestion that the AAA Rules applied to the arbitration in that case. The second, *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.*, 780 F. Supp. 885 (D. Conn. 1991, likewise discusses disclosure and other obligations of the party-appointed arbitrator, but the court derived the particular obligations imposed on the party-arbitrator there from the specific terms of the parties' agreement. *Id.* at 893.

the Court is based on an entirely false premise, *i.e.*, that Delta Mine's party-arbitrator did not properly disclose his prior consulting relationship with Petitioners. The panel below did not even have occasion to address the question whether it would be appropriate to make no disclosure (though, as shown above, it would be) because the Eighth Circuit found that Delta Mine's arbitrator did make a sufficient disclosure. 280 F.3d at 821.

Here, in response to a request, Delta Mine's arbitrator voluntarily disclosed that he had a client-consultant relationship with Delta Mine extending over 15 years. *Id.* This broad disclosure easily satisfied any sensible standard of disclosure under the circumstances. Significantly, when he made that disclosure, Petitioner raised no objection and did not even pose a follow-up question. That is because—in contrast with the position Petitioner asserts here—there was simply nothing shocking, improper, or even surprising in that disclosure, precisely because the partiality of the non-neutrals was assumed. Delta Mine's arbitrator could not have perceived any obligation "to disclose more than his longstanding 'client consultant relationship,' absent a direction from the neutral arbitrators to do so." 280 F.3d at 821. As the Eighth Circuit observed, AFC offers no authority for the proposition that such an allegedly incomplete assertion constitutes "evident partiality" under the FAA. *Id.*

3. Although Petitioners frame their argument in terms of "nondisclosure" of a prior consulting relationship (in an unsuccessful effort to bring the issue presented under the umbrella of *Commonwealth Coatings*), that was not the thrust of Petitioner's objection to the arbitration award in the lower courts. Instead, Petitioners concentrated below on the asserted failure to disclose the precise extent of the work that the arbitrator and his firm undertook when preparing for the technical aspects of the case. *See* Pet. 5-6. Petitioner

believes that such actions should be regarded as improper—and, to invoke *Commonwealth Coatings,* couches its objection to that activity as a failure to disclose that activity.

Yet, once again, these very actions were disclosed. Based on the disclosures, Petitioners in fact expressly complained to the panels that Delta Mine's arbitrator was too closely aligned with Delta Mine's trial team and was exhibiting "evident partiality." Both panels considered and rejected that challenge, noting in their deliberations that the actions being objected to were precisely the actions that the party-arbitrators were required to undertake pursuant to the panels' specific direction that they be prepared to present the case for their respective parties. There is simply no basis in the record for asserting that the assistance of Delta Mine's arbitrator in preparation of the case was "undisclosed."

II. PETITIONER FAILED TO SHOW PREJUDICE

The Eighth Circuit also held that Petitioner failed to show prejudice to which Petitioner responds that no showing of prejudice should be required. To be sure, where the issue concerns the impartiality of a *neutral* arbitrator, a showing of bias can itself be determinative. The inability of the umpire to decide the case objectively, free from bias, would almost invariably affect the outcome.

On the other hand, if one is to try to base a challenge on an asserted non-disclosure by a party-appointed arbitrator, a showing of "prejudice," as required by the Eighth Circuit, is clearly necessary.[13] The Eighth Circuit simply required a

---

[13] Courts require some showing of prejudice, or a causal nexus between the alleged evident partiality and the award, to vacate arbitration awards based on evident partiality of a non-neutral arbitrator. In *Sunkist*, 10 F.3d 753, the court refused to vacate an award because a party-arbitrator participated in case preparation meetings and may have prejudged the merits of the dispute. The court "fail[ed] to see how this prejudiced Sunkist" because there was no evidence that the party-arbitrator discussed

showing that the neutral was "deceived or misled" by the party-arbitrator's partiality or non-disclosure. 280 F.3d at 822. This rule is self-evident: If the neutral arbitrator is not deceived, the non-disclosure cannot be material; it cannot have affected the outcome. Otherwise, any arbitration in which a party-arbitrator is openly partial, in accordance with the arbitration agreement or the direction of the arbitration panel, would be subject to reversal.

Here, the alleged undisclosed fact that Delta Mine's arbitrator was partial and assisting Delta Mine was not only known to the neutrals, but consistent with their direction to the parties and the party-arbitrators. *Id.* Moreover, Petitioner did not labor under any false assumptions here, having been fully apprised of the advocacy role of the party-arbitrators not once, but *twice*, long before the hearing. *Id.* Absent a showing of some prejudice of this type, the very idea of "non-disclosure" is meaningless.

III. THE EIGHTH CIRCUIT DID NOT ERR IN RAISING THE ISSUE OF WAIVER

As one of the three alternative grounds for decision, the Eighth Circuit held that AFC waived its objections by not pressing them before the arbitral panel.

While Petitioner protests the Eighth Circuit raising the issue *sua sponte*, Petitioner does *not* suggest that there was legal error in doing so, let alone a legal error sufficient to warrant certiorari. Nor does Petitioner assert that the Eighth

---

the information received in the preparation meetings with the neutral arbitrators. *Id.* at 759-60; *see also Stef Shipping*, 209 F. Supp. at 253. This is not at odds with the case cited by Petitioner, *Metropolitan*, 780 F. Supp. 885, which holds that evident partiality "must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship with the party who selected him." *Id.* at 892 (quoting *Astoria Medical Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 89 (N.Y. 1962)).

Circuit abused its discretion. Petitioner simply complains that the issue was raised *sua sponte* and cites two instances of an appellate court ruling that the defense of waiver was waived. These cases do not hold that an appellate court has no right to raise waiver *sua sponte*. To the contrary, the Eighth Circuit clearly had the authority to notice such error, particularly as an alternative ground of decision. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). *See also Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998). *E.g.*, *United States v. Continental Can Co.*, 378 U.S. 441, 457 (1964).

Moreover, the Eighth Circuit's waiver holding is clearly correct: It does nothing more than restate the salutary rule that if one seeks to challenge the partiality of the party-appointed arbitrator based on information learned during the arbitration, one must first present that challenge to the arbitration panel, requesting the arbitrator's removal.

Petitioner did not do so here. Petitioner concededly knew of Delta Mine's arbitrator's direct involvement in the preparation of Delta Mine's case, but *notwithstanding* that knowledge, did *not* seek his removal. Instead, AFC sought "a delay in the hearings" which was granted. 280 F.3d at 821. Thus, AFC "expressed concern" about the role assigned to the party-arbitrators by the panels, but did not seek the removal of Delta Mine's party-arbitrator. Consequently, the panels' decision concerning the role of Delta Mine's party arbitrator in case preparation was rendered informally (the panels' approval of the party-arbitrator's involvement in the presentation of the case is evident from the *ex parte* letter from Petitioner's party-arbitrator to Petitioner) and addressed procedurally.

Petitioner's argument that it only learned the particulars of the party-arbitrator's involvement after discovery in the district court does not provide an excuse. Petitioner was aware that Delta Mine's party-arbitrator was participating in case preparation "[w]eeks before the hearings" (280 F.3d at 822) and, after waiting a month, asked the panels to reconsider the role of the party-arbitrators because it could affect the party-arbitrator's ability to judge the case. *Id.* at 818; R. 0418. But Petitioner never sought disqualification. A party cannot do what Petitioner has tried here: register a procedural objection, correctable by the arbitration panel, and then wait until after losing the arbitration to argue to the district court that there was an error of such magnitude that it fundamentally tainted the arbitral award.

Leaving aside that there was no impropriety or error here at all, the Eighth Circuit certainly did not err in requiring that a claim of such impropriety be made in the first instance to the arbitral panel itself.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

W. STANLEY WALCH
CHRISTOPHER M. HOHN
THOMPSON COBURN LLP
One US Bank Plaza
Suite 3500
St. Louis, Missouri 63101
(314) 552-6000

RICHARD MCMILLAN, JR.*
CLIFTON S. ELGARTEN
STEVEN P. TAUB
EDWARD R. MURRAY
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

*Counsel of Record

Attorneys for Respondents

June 24, 2002